

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate
of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

GEORGE BOUCHARD,

NORMAN A. BAILIE,

900 Wilshire Boulevard,

Los Angeles 17, California,

Attorneys for Appellee.

FILED

MAR 25 1955

PAUL P. MURRIEN, CLERK

TOPICAL INDEX

	PAGE
Questions presented	1
Statement	1
Argument	2

TABLE OF AUTHORITIES CITED

CASES	PAGE
California State Board of Equalization v. Goggin, 191 F. 2d 726	3, 6
Louisville Property Co. v. Commissioner, 140 F. 2d 547.....	2
Pinkerton v. United States, 170 F. 2d 846.....	2
United States v. Metcalf, 131 F. 2d 677.....	2
 STATUTES	
Bankruptcy Act, Chap. 11.....	3
Internal Revenue Act of 1938, Sec. 52.....	2
Internal Revenue Code, Sec. 52(a).....	5

No. 14569
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate
of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

This is an appeal from an Order of the United States District Court for the Southern District of California, disallowing the claim of appellant for Federal Income Taxes for the year 1952. The grounds for entering the Order appealed from are set forth in a preliminary order of the District Court filed July 6, 1954. [R. 112-113.]

Questions Presented.

Appellant states the question involved too broadly. (App. Br. p. 3.) The precise question involved in this appeal is whether the Order of the Court, dated May 26, 1952, ordering the liquidation of the assets, terminated the Trustee's authority to conduct the business.

Statement.

Appellee adopts the statement of facts as set forth by Appellant in its Brief, pages 5 and 9, inclusive.

Argument.

The Appellant relies primarily upon three Courts of Appeals' opinions, namely:

United States v. Metcalf, 131 F. 2d 677 (C. A. 9th);

Louisville Property Co. v. Commissioner, 140 F. 2d 547 (C. A. 6th);

Pinkerton v. United States, 170 F. 2d 846 (C. A. 7th).

None of these cases establish any conflict with the decision below. All the Court held in each of these cases was that the activities of the Trustees in Bankruptcy in the years before the Court constituted the operation of the business and property of the bankrupt corporation, and subjected the Trustee to taxation, although the Trustee was holding the assets for ultimate liquidation. The Court, in both the *Pinkerton* and *Louisville Property Co.* cases quote with approval the decision of this Court in the *Metcalf* case. As a matter of fact, the Sixth Circuit in the *Louisville Property Co.* case states that the *Metcalf* case is "an almost identical case."

None of the cases relied upon by Appellant passed upon the point involved in the present case. The decision of the Court below does not conflict with the decision of this Court in the *Metcalf* case. All this Court decided in that case was that the activities of the Trustee during the years 1938 and 1939 constituted "operation of property or business" so as to render the Trustee liable for tax on income from such business under Section 52 of the Revenue Act of 1938. The fact that the ultimate objective of the Trustee in bankruptcy was the liquidation of

the entire estate did not relieve the Trustee from liability for tax on income acquired in the operation of the bankrupt's property. The opinion does not have the effect of determining that the activities of the Trustee in subsequent years amounted to carrying on of business or operating the property.

None of the cases cited by Appellant passed upon the question of the effect of an order of liquidation. The only case which has passed upon this precise point appears to be the opinion of this Court in the case of the *California State Board of Equalization v. Goggin*, 191 F. 2d 726. That case was an action by the California State Board of Equalization against the Trustee in Bankruptcy of the West Coast Cabinet Works, Inc., to recover state sales tax claimed to be due as a result of defendant's sale of certain trucks.

On February 5, 1946, West Coast Cabinet Works, Inc., a corporation, engaged in manufacturing and selling cabinets at retail in California, filed a petition under Chapter 11 of the Bankruptcy Act, and George T. Goggin was appointed receiver. From February 5, 1946, until March 11, 1946, Goggin, as receiver, conducted the business of the corporation under authority of the court, made retail sales, and paid the California sales tax thereon. On March 12, 1946, the corporation was adjudicated a bankrupt and Goggin was appointed Trustee. He continued to conduct the business of the bankrupt until March 22, 1946, and paid the California sales tax on retail sales made.

On March 22, 1946, the trustee was directed by order of the court to sell the assets of the estate. In carrying out the order, the trustee made numerous sales of the

personal property of the bankrupt and paid the California sales tax thereon. On March 29, 1946, the trustee sold at retail, at public auction, five trucks which had been used by the bankrupt for delivery purposes in the conduct of the business. The California sales tax was not added to the purchase price and the sales were not reported in the bankrupt's sales tax return filed by the trustee.

The California State Board of Equalization made an additional determination of taxes owing from the trustee based upon the sale of the trucks, and notice of the assessment was mailed to the trustee. Upon the trustee's failure to make timely payment, a penalty was added to the amount claimed to be due.

On petition of the trustee, the Referee enjoined the California State Board of Equalization from enforcing against the trustee any of the provisions of the California sales tax claimed to be due as a result of the sale of the trucks. The district judge affirmed the referee's order.

The California State Board of Equalization contended that the record established that the five trucks were sold by the trustee "during a period in which he was operating the business of the bankrupt * * *." A stipulation entered into between the State Board of Equalization and the Trustee, stated that during the period from March 12, 1946, to May 1, 1946, George T. Goggin, as trustee for said bankrupt, was engaged in the sale of tangible, personal property at retail * * *." The evidence shows that sales of cabinets were made on April 23, 1946, and on May 14, 1946, after and pursuant to the liquidation order.

This Court affirmed the District Court. It held that the continued operation of a bankrupt business is a matter within the sound discretion of the court, and that when the court on March 22, 1946, ordered liquidation of the assets, the trustee's authority to conduct the business terminated.

The Appellant, in its Brief, passes off this case as irrelevant to the case here because the construction and application of Section 52(a) of the Internal Revenue Code were not involved. Appellant assumes that this court decided that the order of liquidation terminated the trustee's authority to conduct the business in so far as a state tax was concerned, but that it had not terminated his authority in so far as the collection of any federal tax was concerned. So far as the language of the court is concerned, the order of liquidation terminated the trustee's authority for all purposes. Judge Fee, in a concurring opinion, points out that the power of Congress to pass uniform laws in relation to bankruptcies is paramount, and that the statutes so enacted emphasize the necessity of liquidation in order to make distribution of assets. Congress has given the Bankruptcy Court plenary powers to that end, and that acting under these powers, the referee ordered a liquidating sale of certain trucks; that a tax on this transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power; that such tax may also be considered as a license fee required of a federal officer to make liquidation. In either event it is void.

The District Court in affirming the referee's order denying the claim of the Government for taxes on receipts by

the trustee subsequent to the order of liquidation, relied on the opinion of this Court in *California State Board of Equalization v. Goggin* [R. 112-113].

The decision of the Court below was clearly correct, and is in accordance with the decision of this Court in the *Goggin* case. We respectfully submit that it should be affirmed.

GEORGE BOUCHARD,

NORMAN A. BAILIE,

Attorneys for Appellee.